Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-636

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 75-672

T.I.M.E.-D.C., INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

N.A.A.C.P. Legal Defense and Educational Fund, Inc., hereby moves to for leave to file the attached brief as *amicus curiae.*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to the Court. The proposed brief is submitted in support of respondent though advancing reasons somewhat different than those relied on by the courts below.

WHEREFORE, the N.A.A.C.P. Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted, and that the attached brief be filed.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ARGUMENT

The Decision of the Court of Appeals Should Be Affirmed

The petitioners in these cases present an across the board challenge to the procedures which have evolved

over the last dozen years in the lower courts for trying and remedying cases involving systematic racial discrimination in large industrial plants or companies. Such cases frequently concern employment transactions over a period of many years, involving thousands of employees and tens of thousands of promotions, transfers, and other personnel transactions.[1] The employer often has scores of departments or offices and large numbers of supervisory and personnel officials. The promotional systems are commonly of great complexity, permeated with manipulable rules and discretion affording a wide variety of opportunities for discrimination. The standards applied by the Fifth Circuit in this case are the result of extensive judicial experience in a wide variety of cases under Title VII of the 1964 Civil Rights Act. Those standards are, to be sure, an equitable treatment of the parties in this action; more importantly, they are a carefully fashioned solution to the administrative problems posed by cases of such size and complexity. The approach urged by the petitioners would not only leave unremedied the palpable discrimination shown in this case, but would establish a manifestly unworkable procedure for handling government pattern and practice suits and private class actions.

1. The Finding of Liability

Petitioners complain that the courts below, in finding a pattern of practice of discrimination, relied heavily on "mere statistics." They object that such evidence is of little significance in establishing whether the company had a

[1] See, e.g., *United States* v. *United States Steel Corporation*, 520 F.2d 1043 (5th Cir. 1975) (3,000 black employees); *Pettway* v. *American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974) (2,500 employees); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971) (18,000 employees); *Capers* v. *Long Island R.R. Co.*, 5 EPD ¶ 8556 (E.D.N.Y. 1973) (7,000 employees).

policy of discriminating against non-whites in the hiring of line drivers. Amicus maintains that such statistical evidence is of great probative value, and was sufficient without more to establish a *prima facie* case in this action.

The question at issue is one of intent, whether the company and its officials, in their hiring and assignment practices prior to 1973, made such personnel decisions on the basis of race. Except in the unlikely event of a confession of guilt, it would ordinarily be difficult to establish whether an individual personnel action, considered in isolation, was the result of discriminatory intent. The company might assert that that action, though it had an adverse effect on the black employee involved, was in fact due to some other circumstance, such as employee qualification, job requirements, or inadvertence. The underlying intent could most readily be tested by inquiring whether the company had a pattern of similar action adverse to the black employees in a number of cases of varying circumstances. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973). As Professor Wigmore notes:

> To prove Intent, as a generic notion of criminal volition or willfulness, including the various non-innocent mental states accompanying criminal acts, there is employed . . . that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.[2]

"The prior doing of similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." *Keyes* v. *School District No. 1*, 413 U.S. 189, 207 (1973); *United States* v. *Ross*, 321 F.2d 61, 67 (2d Cir. 1963) (Friendly, J.);

[2] II Wigmore on Evidence §302, p. 196 (3rd Ed.).

United States v. *Schiller*, 187 F.2d 572, 575 (2d Cir. 1959) (Hand, J.)[3] Thus in an action alleging faculty segregation in a public school system, the plaintiff would more than meet his initial burden of proof by showing that all or most black teachers were assigned to predominantly black schools, and that all or most of the faculty at predominantly white schools were white.

In the instant case one could not necessarily infer discriminatory intent from the fact, in isolation, that a particular black was assigned to work as a city driver, or that a particular white was assigned to work as a line driver. The record, however, shows that, of the large number of black truck drivers employed in 1969, *all* were assigned to work as city drivers, and that of more than 1800 line drivers in that year, only 5 were Mexican American. 517 F.2d 299, 312. That pattern of assignment compels the conclusion, in the absence of detailed rebuttal evidence not present here, that these assignments were made on a racial basis. In the instant case the government showed far more than this, adducing the testimony of more than a score of witnesses as to specific instances of discrimination. This additional evidence increased the evidentiary showing required of the defendants to rebut the plaintiff's case.

For these reasons the evidence adduced by the United States in this case greatly exceeded that required to establish a *prima facie* case. Indeed, if the massive investigation and evidentiary showing made here were required in ordinary cases, the presentation of a class action would be far beyond the ability of most private litigants. The

[3] *See, e.g., United States* v. *Braverman*, 376 F.2d 249, 252 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967) (Alleged innocent intent of defendant who had cashed six counterfeit money orders disproved by evidence he had cashed 36 others.)

preparation of this case consumed more than half the time of two experienced Department of Justice trial attorneys, and a research analyst, for a year and a half. They were aided by officials of several other federal agencies: the United States Postal Service supplied documentary evidence on the defendants' employment patterns, the Equal Employment Opportunity Commission provided a variety of individual complaints, and the Federal Bureau of Investigation extracted and copied thousands of documents from the defendants' files. A team of government lawyers deposed over 60 witnesses in 10 cities, interviewed another 150 witnesses, and xeroxed over 1,000 additional documents. At trial the government called 14 witnesses from throughout the country, introduced the depositions of scores of others, and offered over 200 exhibits. 517 F.2d at 306, 314. Such an investigation and presentation substantially exceeded the minimum amount necessary to establish a *prima facie* case, and was manifestly far beyond the resources of most private plaintiffs who have been the victims of discrimination and whom Congress intended to play a major role in the enforcement of Title VII.

Petitioners further object, however, that proof of a general policy of discrimination is insufficient to warrant relief for any individual non-white employee, and that discrimination against a particular employee cannot be inferred from that policy. In *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), this Court held that once a showing has been made that a defendant's conduct was significantly tainted by discriminatory purpose, the burden shifts to the defendant to prove that all such conduct was not so tainted, 413 U.S. at 209-210.[4] "We have never suggested that plain-

[4] In the context of intentional segregation of public schools, the Court explained, "[A]t that point where an intentionally segregative policy is practiced in a meaningful or significant segment of

tiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every student within the school system." 413 U.S. at 200. Similarly the existence of a *prima facie* case of discrimination in a Title VII action is sufficient, unless successfully rebutted in general or as to particular individuals, to require relief for all the affected class of minority employees. *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444, 466, n. 32 (1976).

2. The Injunctive Remedy

The evidence in this case clearly showed, and the district court correctly found, that the defendants had engaged in a pattern and practice of discrimination by denying to blacks and Mexican Americans the opportunity to be hired as line drivers. To remedy this systematic discrimination the court of appeals directed a correspondingly systematic remedy, i.e. that blacks and Mexican Americans, who were previously ineligible because of their race for line driver jobs, be given an opportunity to transfer those jobs with seniority status sufficient to make such a transfer feasible. Minority drivers seeking to transfer would still be required to meet such non-discriminatory qualifications as were actually applied in the past to white drivers.

The remedy sought by the government and awarded by the court of appeals was less than complete relief under Title VII. Minority drivers will not be afforded an opportunity *now* to transfer to line driver jobs; they must wait until, through retirement or increased demand, there are vacancies on the line driver rosters. It may be years until sufficient vacancies occur for all minority drivers who seek to transfer, and some of those drivers may well reach retirement age before their opportunity to transfer arises. Pending such vacancies, blacks and Mexican Americans assigned to other jobs because of their race will continue to be consigned to those lower paying positions,[4] while whites hired as line drivers because of their race, and whites hired after the finding of liability but before implementation of the Fifth Circuit order, continue to enjoy the high salaried line driver positions which they would not have held in the absence of discrimination. Even when a minority driver succeeds in transferring, he will still not be in the economic position he would have enjoyed in the absence of discrimination, because ahead of him on the seniority roles will be whites who, but for the unlawful discrimination, would not have been hired. *See Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444, 469 (1976). In sum, the remedy ordered by the Fifth Circuit will move with the uncertain tempo of all deliberate speed, and will, even in the long run, fall short of making minority employees whole.

The defendants nonetheless characterize this relief as drastic in nature and unwarranted by the record in this, or perhaps any, case. Their primary concern is that, if now afforded the opportunity to become line drivers which they were previously denied, more, or different, minority employees will choose to work as line drivers than would have done so had that opportunity not been denied to them,

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a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only 'isolated and individual' unlawfully segregative actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent." 413 U.S. at 209.

[4] During the period until they are able to transfer to line driver jobs the minority employees will be entitled to front pay. *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444, 469, n. 38 (1976).

on account of their race, when they were initially hired. The defendants offered no evidence to suggest that this is in fact likely to occur. The burden of demonstrating that a minority employee would not have wanted a more lucrative road driving job is very substantial, both because any answer to such a hypothetical question concerning events years in the past is inherently speculative and because the defendants would not have maintained that discriminatory policy if they had thought the minority employee did not want the position anyway.

The partial, slow, but systematic remedy ordered in this case, and known as the "rightful place" relief, represents a workable approach fashioned by the lower courts, on the basis of extensive experience in a variety of cases, to remedying discrimination against large numbers of individuals in a complex industrial setting. Such rightful place relief entails the right to transfer into the next available vacancy combined with sufficient seniority relief to make it feasible in fact for minority employees to transfer to previously all white jobs and thus disestablish the dual system created by past discrimination. *Green* v. *New Kent County*, 391 U.S. 430 (1968). Although this remedy is invariably incomplete, and tends to leave minority employees in positions worse, and white employees in positions better, than would have been the case in the absence of discrimination, it avoids the need for burdensome, if not unfeasible, speculation as to what position each minority employee would have held but for the discrimination.[6] Either party, we believe, should have the right to seek such a hypothetical historical analysis. If, however, such an analysis proves

[6] Because minority employees are entitled to front pay until they transfer into their rightful place, the burden of compliance with Title VII under this approach falls more heavily on company or union than on white employees. *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444, 469, n. 38, 471 (1976).

possible and is undertaken, the resulting certainty as to precisely where each minority employee belongs will remove any basis for the incompleteness of "rightful place" relief; in such a case each minority employee must be placed at once in the position he would have held in the absence of discrimination. We note that, whatever the injunctive remedy, an innocent white whose present or future position is adversely affected by tardy compliance with Title VII may, in an appropriate case, seek monetary relief against the employer or union responsible for the discrimination. *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444, 471 (1976) (Burger, C.J., concurring and dissenting).

3. Union Liability

The International in this case has urged that it should not be held liable for the discriminatory effect of the seniority system because the contract between the Teamsters and the employers was ratified and signed by the local unions.[7] The Teamster local in *Teamsters Local Union 657* v. *Rodriguez*, No. 75-651, takes the opposite position, urging that it is International which is liable, since the International had actually negotiated the contracts involved, and the Local had agreed to be bound by the results of those negotiations if approved by a majority of the other locals.[8] The Southern Conference of the Teamsters urges that the company alone is liable, because the discriminatory seniority system could not deter transfers between terminals, or from city to road jobs, since such

[7] In its Petition the International suggested the liability might lie with the Conference. Petition, No. 75-636, pp. 28-30. The International's brief is silent on this issue.

[8] Brief in No. 75-651, pp. 14-20.

transfers were forbidden by company rule.[9] These conflicting contentions regarding union liability are all mistaken.

Each of these arguments is founded on the erroneous assumption that Title VII permits a union to knowingly acquiesce in employer discrimination by failing to protest such violations of the rights of its minority members, and that a union only becomes liable if it forces that discriminatory policy on the employer. Three circuits have recognized the existence of "an affirmative union obligation under Title VII" in its vital role as bargaining agent, to negotiate actively for nondiscriminatory treatment of its black members. *Macklin* v. *Spector Freight Systems*, 478 F.2d 979, 989 (D.C. Cir. 1973).[10] "Where a union has not done so and where there is such solid evidence of employer discrimination as is alleged here, it would undermine Title VII's attempt to impose responsibility on both unions and employers to hold that union passivity at the negotiating table in such circumstances cannot constitute a violation of the Act." *Id.* That affirmative duty includes a responsibility to scrutinize the effect of the union's collective bargaining agreements[11] and the conduct of an International to which it belongs or locals which it has created,[12] and to seek "corrective steps to prevent discriminatory practices, to remove impediments that perpetuate past discrimina-

[9] Brief in No. 75-715, pp. 18-22.

[10] *Kaplan* v. *International Alliance of Theatrical, etc.*, 525 F.2d 1354, 1360 (9th Cir. 1975); *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372, 1379 (5th Cir. 1974).

[11] *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 737, n. 32 (5th Cir. 1976); *Wells* v. *Frontier Airlines*, 381 F. Supp. 818, 821 (N.D. Tex. 1974).

[12] *Kaplan* v. *International Alliance of Theatrical, etc.*, 525 F.2d 1354, 1360 (9th Cir. 1975).

tion, and to place discriminatees in their 'rightful place' ".[13] These obligations to protect the legal rights of minority members cannot be ignored because of the whims of the majority.[14]

This affirmative duty comports with the practical and legal realities with which Title VII is concerned. Where, as here, a union is certified by the National Labor Relations Board as an exclusive bargaining representative, minority members of the union lose their right to engage on their own in concerted activity to compel the employer to bargain with them about unlawful discrimination. *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50 (1975). Minority members cannot resort to such activity even if the union has failed to take steps to remedy "the discrimination to the fullest extent possible, by the most expedient and efficacious means." *Id.*, p. 60. This loss of minority rights must entail a corresponding duty on the part of the union to use in the vigorous protection of minority rights the power to bargain and engage in concerted activity unavailable to those minority members themselves. The union cannot give preference to the desires and interests of white members in either its decision as to which employer practices to seek to modify or in its decision as to which employer practices to accept. To acquiesce in employer discrimination because it benefits white members, as to seek such discrimination for that reason, is to violate the union's duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and

[13] *Myers* v. *Gilman Paper Co.*, 392 F. Supp. 413, 420 (S.D. Ga. 1975).

[14] *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977, 989 (N.D.N.Y. 1970), rev'd in part on other grounds, 466 F.2d 652 (2d Cir. 1971).

honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967).

When the terms and conditions of employment discriminate against blacks, the primary beneficiary is not the employer but the white employees. Discrimination in promotions against black union members is *ipso facto* discrimination in favor of white union members. It would blink reality to suggest that an employer would elect to continue such policies in the face of objections from the union representing the whites to whom it was giving the unlawful preference. When a white dominated union acquiesces in such violations of Title VII to the benefit of its white majority, it cannot thereafter avoid liability by asserting it is a stranger to the misconduct involved.

It is thus clear that under Title VII, as under the National Labor Relations Act, no distinction can be made between a union which urges the employer to discriminate and a union that merely acquiesces in such discrimination. The controversy between the Local, Conference and International as to who is "responsible" for the seniority system and its discriminatory effect is, at the liability stage, irrelevant, for each of the union entities at the least acquiesced in the use of that system. While differing roles may bear on the allocation of back pay liability among the unions, all of them violated the law by failing to make any effort to prevent the adoption or continuation of that discriminatory system[15] and each is jointly and severally liable for the resulting economic injury.

The unions suggest, however, that they are immune from liability because they delegated away any duties under Title VII. The International claims it delegated its

[15] Under the N.L.R.A. the duty of care may apply only to the specific union entity which is the designated exclusive bargaining agent; no such distinction is made by Title VII.

responsibilities to the locals pursuant to the union constitution which provides that the locals have the ultimate power of ratification. The Local claims it delegated its responsibility to the International by a power of attorney to bargain with the employers. The union duty of care under Title VII, however, cannot be delegated away. It is, in this regard, similar to the non-delegable duty of an employer to protect his employee from injury. The contrary rule would invite frustration of Title VII by a delegation of union responsibility to a union entity which lacked the economic power to effect employer practices or which, against a claim for back pay, was judgment proof.

In an action under Title VII an aggrieved employee may join as a defendant any union entity which affirmatively engaged in discrimination or which failed to meet its obligation to the employee, as a member, applicant, or otherwise, to protect him or her from, and to remedy, unlawful discrimination. If the union which is so joined maintains that another union or unions also failed, perhaps to a greater degree, to satisfy that obligation, its recourse is to join such other union or unions as a third party defendant under Rule 14, Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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